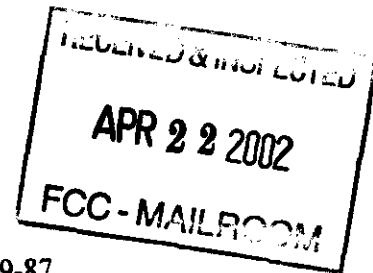


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)

Implementation of Sections 309(j) and)
337 of the Communications Act of 1934)
as Amended)

WT Docket No. 99-87

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 2002

Released: April 18, 2002

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In the *Report and Order and Further Notice of Proposed Rule Making* ("R&O" and "FNPRM") in this proceeding,¹ the Commission adopted rules and policies to implement Sections 309(j)

¹ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile
(continued...)

a series of rulemaking proceedings adopted rules and policies to implement Section 309(j).⁵

4. Pursuant to the 1993 Budget Act, Section 309(j)(1), "General Authority," only permitted the Commission to use competitive bidding for subscriber-based services if mutual exclusivity existed among initial license applications. Section 309(j)(6)(E) also made clear that the Commission was not relieved of its obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity.⁶ The Commission has determined that applications are "mutually exclusive" if the grant of one application would effectively preclude the grant of one or more of the other applications.⁷ Where the Commission receives only one application that is acceptable for filing for a particular license that is otherwise auctionable, there is no mutual exclusivity, and thus no auction. Therefore, mutual exclusivity is established when competing applications for a license are filed.

5. Section 309(j)(1) also restricted the use of competitive bidding to applications for "initial" licenses or permits.⁸ In addition, Section 309(j)(2) set forth conditions beyond mutual exclusivity that had to be satisfied in order for spectrum to be auctionable.⁹ Generally speaking, these conditions subjected to auction those services in which the licensee was to receive compensation from subscribers for the use of the spectrum.¹⁰ Former Section 309(j)(2) further directed the Commission, in evaluating the "uses to which bidding may apply," to determine whether "a system of competitive bidding will promote the [public interest] objectives described in [Section 309(j)(3)]."¹¹ Employing these criteria, the

(...continued from previous page)

Private Mobile Frequencies Below 800 MHz, *Notice of Proposed Rule Making*, WT Docket No. 99-87, RM-9332, RM-9405, 14 FCC Rcd 5206 (1999) ("Notice").

⁵ See *id.* at 5208-21 ¶¶ 3-22. See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245 (1994).

⁶ 47 U.S.C. § 309(j)(6)(E).

⁷ See *Notice*, 14 FCC Rcd at 5210 ¶ 4 (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2350 n.5).

⁸ Renewal licenses were excluded from the auction process. See H.R. Rep. No. 103-111, at 253. See also *id.* at 2355.

⁹ See 47 U.S.C. § 309(j)(2)(A) (1996).

¹⁰ Among the services found to be auctionable under the 1993 Budget Act were narrowband and broadband Personal Communications Services, Public Mobile Services, 218-219 MHz Service, Specialized Mobile Radio Services (SMR), Private Carrier Paging (PCP) Services, Multipoint Distribution Service (MDS), Local Multipoint Distribution Service (LMDS), 2.3 GHz Wireless Communications Service (WCS), satellite Digital Audio Radio Service (DARS), Direct Broadcast Satellite (DBS) Service, 220-222 MHz Radio Service, Location and Monitoring Service (LMS), and VHF Public Coast Stations, all of which involve commercial use of the spectrum. See *Notice*, 14 FCC Rcd at 5212-13 ¶ 8; see also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359 ¶¶ 62-63. The plain language of the 1993 Budget Act also excluded traditional broadcast services from competitive bidding, because broadcast licensees do not receive compensation from subscribers. See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2352 ¶ 22.

¹¹ 47 U.S.C. § 309(j)(2)(B) (1996). Section 309(j)(3), entitled "Design of Systems of Competitive Bidding," directs that these factors be addressed in both identifying classes of licenses to be issued by competitive bidding, and designing particular methodologies of competitive bidding:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(continued....)

Commission the authority to use competitive bidding to resolve mutually exclusive applications for initial licenses or permits if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the objectives described in Section 309(j)(3).¹⁷ As amended by the Balanced Budget Act, Section 309(j)(1) states that the Commission *shall* use competitive bidding to resolve mutually exclusive initial license or permit applications, unless one of the three exemptions provided in the statute applies.¹⁸ The Commission has found that the list of exemptions from our general auction authority set forth in Section 309(j)(2) is exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding.¹⁹ Left unchanged by the Balanced Budget Act is Section 309(j)(3)'s directive to consider the public interest objectives in identifying classes of licenses and permits to be issued by competitive bidding. Moreover, the general auction authority provision of Section 309(j)(1) now references the obligation under Section 309(j)(6)(E) to use engineering solutions, negotiation, threshold qualifications, service regulations, or other means to avoid mutual exclusivity where it is in the public interest to do so. In addition, the portion of the Conference Report that accompanies this section of the legislation emphasizes that notwithstanding the Commission's expanded auction authority, its determinations regarding mutual exclusivity must still be consistent with and not minimize its obligations under Section 309(j)(6)(E).²⁰

8. In the *R&O* in this proceeding, which was initiated by the *Notice*, the Commission adopted rules and policies to implement Sections 309(j) and 337 of the Communications Act of 1934 ("Communications Act"), as amended by the Balanced Budget Act. The *R&O* provided the general framework for exercise of the Commission's auction authority in light of the Balanced Budget Act's revisions to Section 309(j).²¹ The Commission concluded that its authority under the Balanced Budget Act continues to permit it to adopt licensing processes that result in the filing of mutually exclusive applications where such an approach would serve the public interest.²² Further, it concluded that in addition to other licensing mechanisms that have been used previously, the use of band manager licensing should be considered as a future option for private as well as commercial services.²³

9. In addition, the Commission defined the scope of the Balanced Budget Act's exemption from auctions for licenses and permits issued for "public safety radio services" by concluding that this exemption from auctions was intended to apply not only to traditional public safety services such as police, fire, and emergency medical services, but also to spectrum usage by entities such as utilities, railroads, transit systems, and others that provide essential services to the public at large and that need reliable communications in order to prevent or respond to disasters or crises affecting their service to the public.²⁴ In that connection, it also concluded that the public safety exemption applies only to services in which protecting the safety of life, health, or property within the meaning of Section 309(j)(2)(A)

¹⁷ See 47 U.S.C. § 309(j)(1), (2) (1996).

¹⁸ See 47 U.S.C. § 309(j)(2) (emphasis added).

¹⁹ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, MM Docket No. 97-234, 13 FCC Rcd 15920, 16000 ¶ 199 (1998).

²⁰ The conferees expressed concern that the Commission not interpret its expanded auction authority in a manner that overlooks engineering solutions or other tools that avoid mutual exclusivity. See H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997) ("Conference Report").

²¹ See *R&O and FNPRM*, 15 FCC Rcd at 22719-22 ¶¶ 21-25.

²² *Id.*

²³ *Id.* at 22727-35 ¶¶ 35-50.

²⁴ *Id.* at 22746-47 ¶¶ 75-78. The other statutory exemptions were not addressed in the *R&O*, and will not be discussed in this *MO&O*. See *id.* at 22739 ¶ 62.

requests reconsideration of the five-year holding period for those PLMR licensees that wish to transfer, assign or modify their authorization for use of PLMR channels in commercial operations.³⁴ The Association of Public-Safety Communications Officials-International (APCO) seeks reconsideration of the Commission's interpretation and application of Section 337(c)(1)(A) and (E).³⁵

III. DISCUSSION

A. Obligation to Avoid Mutual Exclusivity

13. *Background.* The *R&O* established the regulatory framework for implementation of the Commission's revised auction authority under Section 309(j) of the Act.³⁶ In the *R&O*, the Commission addressed whether the amendment of Section 309(j)(1) to incorporate an express reference to the Commission's obligation to consider alternatives to mutual exclusivity under Section 309(j)(6)(E) changes the scope or content of that obligation.³⁷ The Commission analyzed the statute and the underlying legislative history and concluded that the added reference in Section 309(j)(1) to Section 309(j)(6)(E) "serves to underscore the Commission's pre-existing obligation, but did not change its fundamental scope or content."³⁸

14. *Discussion.* UTC urges the Commission to reconsider this conclusion, and insists that the Commission "must continue to retain licensing regimes that avoid mutual exclusivity."³⁹ However, the *R&O* made no blanket determination to eliminate licensing regimes that avoid mutual exclusivity. As UTC's petition acknowledges, the *R&O* did not change licensing procedures in existing services that preclude or limit the likelihood of mutually exclusive applications, and made no specific determination about what licensing procedures to adopt for future services.⁴⁰ While the Commission pointed out that it remains within the Commission's authority to modify an existing licensing regime that avoids mutual exclusivity to permit the acceptance of mutual exclusive applications that are resolved by auctions, it also made clear that, should this issue arise in future service-specific rulemaking proceedings, as part of the Commission's public interest analysis we should give significant consideration to the effectiveness of licensing mechanisms that avoid mutual exclusivity, and weigh the potential costs of any such change against the potential benefits.⁴¹

15. UTC also urges the Commission to give more weight to avoiding mutual exclusivity in establishing licensing procedures.⁴² In this regard, UTC's argument is similar to that made by the private radio service interests that previously contended that the added reference in Section 309(j)(1) to Section 309(j)(6)(E) requires the Commission to give greater weight to avoiding mutual exclusivity and less to other public interest objectives in determining which wireless services are potentially auctionable.⁴³ The Commission expressly rejected this reading of the statute in the *R&O* and instead retained its long-

³⁴ AllCom Petition for Reconsideration (filed Jan. 31, 2001).

³⁵ APCO Petition for Reconsideration (filed Feb. 2, 2001).

³⁶ See *R&O and FNPRM*, 15 FCC Rcd at 22718-23 ¶ 18-27.

³⁷ See *R&O and FNPRM*, 15 FCC Rcd at 22719-23 ¶ 19-27.

³⁸ See *id.* at 22719-20 ¶ 21.

³⁹ See UTC Petition at 9.

⁴⁰ See *id.* at 9 (citing *R&O and FNPRM*, 15 FCC Rcd at 22711 ¶ 3).

⁴¹ See *R&O and FNPRM*, 15 FCC Rcd at 22722-23 ¶ 27.

⁴² See UTC Petition at 9-10.

⁴³ See *R&O and FNPRM*, 15 FCC Rcd at 22718-22 at ¶¶ 20-25 (rejecting statutory interpretation proposed by UTC and other private radio entities).

utilities' view incorrectly assumes that, if the Commission were to adopt band manager licensing for private radio services, it would also eliminate the eligibility restrictions for those bands and permit commercial entities to bid on spectrum reserved for private use.⁵² In fact, the *R&O* made no such determination. Instead, the *R&O* decision did "not adopt band manager licensing in any existing private radio service, nor [did] we make any specific decision to do so in any future service."⁵³ In the *R&O*, the Commission observed that issues of whether particular kinds of rules, such as eligibility restrictions, should be adopted for a specific band will be addressed in future service-specific rulemakings.⁵⁴ Furthermore, to the extent that petitioners believe that band manager licensing in a specific band would not be in the public interest, they will have an opportunity to comment on this issue in the service-specific rulemaking proceeding. For this reason, we find these objections are also premature.

18. The utilities contend that band manager licensing is an impermissible delegation of the Commission's licensing authority.⁵⁵ These arguments were raised and addressed in the *R&O*⁵⁶ and the parties make no new arguments here. Therefore, we do not address petitioners' arguments.

C. Exemption from Competitive Bidding for Public Safety Radio Services

19. As noted earlier, the Balanced Budget Act, excludes public safety radio services from our authority to auction spectrum. In this regard, the Conference Report for Section 3002(a) of the Balanced Budget Act further illustrates Congress's intentions for public safety radio services and states that the exemption includes "private internal radio services" used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services, such as AAA.⁵⁷

20. In the *R&O*, the Commission, *inter alia*, examined the scope of the public safety radio services exemption contained in the Act and explored mechanisms that may be used in the event that mutually exclusive applications for public safety radio services are filed. Specifically, the Commission concluded that the public safety radio services exemption applies to particular services, rather than individual users. In addition, the Commission determined that the public safety exemption from auctions was not limited to spectrum used by traditional public safety services, such as police, fire, and emergency medical services, but also included spectrum used by entities, such as utilities, railroads, transit systems, and others that provide essential services to the public at large and that need reliable communications in

⁵² See Cinergy Petition at 14-15 ("The Band Manager also frustrates another purpose of Title III; (sic) to promote the safety of life and property and to further the public interest in the grant of radio licenses. These purposes are completely ignored if the Commission allows a Band Manager to decide who is allowed to use the spectrum."); Consolidated Edison Petition at 14-15 (same); Entergy Petition at 14-15 (same); KCPL Petition at 15-16 (same); Omaha Petition at 16 (same); Scana Petition at 15-16 (same); Union Electric *et al* Petition at 15 (same); Xcel Petition at 14-15 (same); and Consolidated Edison Petition at 15-16 (same).

⁵³ *R&O and FNPRM*, 15 FCC Rcd at 22727 ¶ 35. In addition, the Commission pointed out that "we have no plans at this time to implement band manager licensing in existing private radio service that are licensing on a site-by-site basis." *R&O and FNPRM*, 15 FCC Rcd at 22732 ¶ 44.

⁵⁴ See *R&O and FNPRM*, 15 FCC Rcd at 22734 ¶ 49.

⁵⁵ See Cinergy Petition at 15-16; Consolidated Edison Petition at 15-16; Entergy Petition at 15-16; KCPL Petition at 16; Omaha Petition at 17; Scana Petition at 16-17; Union Electric *et al*. Petition at 16; and Xcel Petition at 15; Consolidated Edison Petition at 16-17.

⁵⁶ See *R&O and FNPRM*, 15 FCC Rcd at 22730 ¶ 42. See also Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, WT Docket No. 99-168, 15 FCC Rcd 5299, 5319-21 ¶¶ 42-47 (2000).

⁵⁷ See Conference Report at 572.

regardless of the private radio spectrum band or bands they use.⁶⁴ For instance, power utility companies Cinergy Corporation and Entergy Corporation argue that we lack authority under Section 309(j) of the Communications Act to conclude that spectrum allocated for use by utilities (*i.e.*, 470-512, 800 and 900 MHz) is subject to competitive bidding because the plain language of Section 309(j) prohibits the use of competitive bidding in connection with public safety radio services, which includes services used by utilities to protect the safety of life or property.⁶⁵

24. While the approach identified by the petitioners might ensure that those specific users identified in the Conference Report would be able to secure spectrum without ever being subject to competitive bidding, we are not persuaded by petitioners' contentions and believe that the interpretation of Section 309(j)(2) set forth in the *R&O* is consistent with Congress's intentions with respect to the public safety radio services auction exemption. Section 309(j)(2)(A) reads (in relevant part) "for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations."⁶⁶ Congress specifically makes reference to "services" on the face of the statute and does not indicate that anything other than "services" are exempt from auction. Consequently, Section 309(j)(2)(A) does not mandate that we exempt specific radio "users" or "licensees."⁶⁷

25. Although the legislative history of the Balanced Budget Act refers to particular "users" as being exempt, the Commission has held that this language is best interpreted as illustrating the types of services that fall within the new statutory exemption.⁶⁸ The plain language of the statute references "services."⁶⁹ Reconciling the statute with the legislative history in this fashion not only properly gives greater weight to the statute itself, but also provides for truly workable implementation of its intent. If, by way of alternative interpretation, each user of the type of services mentioned in the legislative history were considered statutorily exempt from the competitive bidding process, these entities would be afforded carte blanche to disrupt any competitive bidding process with respect to non-exempt services.⁷⁰

26. Furthermore, the interpretation in the *R&O* is consistent with our spectrum allocation and management policies. As one of the petitioners observes, in interpreting public safety radio services, the Commission interpreted the term "service" in Section 309(j)(2) as it is used in our Rules (*i.e.*, to denote a radio service consisting of a combination of operating and eligibility rules and associated spectrum).⁷¹ We believe that Congress recognized that many of our current services are "mixed use," containing both entities that use spectrum to protect the safety of life, health, or property, and others that do not protect the safety of life, health, or property. If, by way of alternative interpretation, each user of the type of services mentioned in the legislative history were considered statutorily exempt from the competitive bidding process, utility companies, for example, would gain an advantage that seems inconsistent with and certainly not required by the statutory language. Under this alternative interpretation, utility companies

⁶⁴ AAA Petition at 7; Cinergy Petition at 2-3, 7; Commonwealth Edison Petition at 2-3, 7; Consolidated Edison Petition at 2-3, 7; Entergy Petition at 2-3, 7; KCPL Petition at 2-3, 7; Omaha Petition at 2-3, 7; Scana Petition at 2-3, 7; Union Electric *et al.* Petition at 2-3, 7; Xcel Petition at 2-3, 7.

⁶⁵ Cinergy Petition at 2-5; Entergy Petition at 2-5.

⁶⁶ See 47 U.S.C. § 309(j)(2)(A).

⁶⁷ In addition, we note that Section 337 of the Communications Act, 47 U.S.C. § 337, does allow entities providing public safety services to obtain spectrum not allocated for public safety use, under certain conditions.

⁶⁸ *R&O and FNPRM*, 15 FCC Rcd at 22741 ¶ 66.

⁶⁹ See *supra* para. 24.

⁷⁰ See paras. 28 and 36 *infra*.

⁷¹ See, *e.g.*, Cinergy Petition at 8.

recognized, a license assignment scheme that would permit any entity seeking to use spectrum for public safety purposes to prevail against all other mutually exclusive applicants in securing spectrum designated for auction “would, in effect, give [such entities] a ‘right of refusal’ over any spectrum made available by the Commission” under its competitive bidding processes.⁸⁰ Because such an approach would make spectrum freely available to public safety radio service eligibles on demand, the Commission and other potential applicants would not know in advance which licenses would be available at auction.⁸¹ This uncertainty would give rise to delays in the deployment of new spectrum-based services and would frustrate the statutory objectives of competitive bidding, as expressed in the Communications Act.⁸²

29. Further, we believe that petitioners’ proposed approach would also undermine the Commission’s duty under Section 303(y)(2) to allocate spectrum so as to provide flexibility of use – that is, to expand the range of permissible uses within a particular service – provided certain conditions are met.⁸³ One way to avoid the administrative inefficiencies that would result from the petitioners’ proposed approach would be to forbid entities eligible to be licensed on public safety radio services from voluntarily participating in auctions for spectrum that is not exempted from our competitive bidding authority. The Commission has, however, rejected this alternative, having found that such an approach was not consistent with Congress’s intent.⁸⁴ Instead, consistent with our obligations under Sections 303(y) and 309(j)(3),⁸⁵ the *R&O* made clear that we will continue to permit public safety entities to participate voluntarily in auctions for spectrum that is not exempted from our competitive bidding authority.⁸⁶ For these reasons, we believe that the Commission’s interpretation of Section 309(j)(2)’s public safety radio services exemption in the *R&O* is proper and consistent with congressional intent. Thus, we find no basis for reconsidering the interpretation in the *R&O*.

2. Private Internal Radio Service

30. *Background.* In the *R&O*, the Commission defined the “private internal radio service” element of the statutory exemption as “a service in which the licensee does not make a profit, and all messages are transmitted between fixed operating positions located on premises controlled by the licensee and the associated fixed or mobile stations or other transmitting or receiving devices of the licensee, or between mobile stations or other transmitting or receiving devices of the licensee.”⁸⁷

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and Monitoring Service (LMS)). Subsequently, Hennepin County sought LMS frequencies under Section 337, and that application also was denied. *See Hennepin County, Order*, 14 FCC Rcd 19418, 19423 ¶ 10 (WTB 1999) (denying a request for waiver pursuant to Section 337, which was filed five weeks before the commencement of the LMS auction, for failure to meet statutory requirements).

⁸⁰ *See LMS Reconsideration Order*, 14 FCC Rcd at 1345 ¶ 10.

⁸¹ *See id.*

⁸² *See* 47 U.S.C. § 309(j)(3)(A)-(E).

⁸³ *See* 47 U.S.C. § 303(y). Consistent with the statutory dictate of Section 303(y), the Commission has recognized that flexible spectrum allocations may result in more efficient spectrum markets which may, in turn, result in more efficient use of the spectrum. *See Principles for Reallocation of Spectrum To Encourage the Development of Telecommunications Technologies For the New Millennium, Policy Statement*, 14 FCC Rcd 19868, 19870-71 ¶ 9 (1999).

⁸⁴ *See R&O and FNPRM*, 15 FCC Rcd at 22751-52 ¶ 87.

⁸⁵ 47 U.S.C. §§ 303(y), 309(j)(3)(A)-(E).

⁸⁶ *R&O and FNPRM*, 15 FCC Rcd at 22751-52 ¶ 87.

⁸⁷ *R&O and FNPRM*, 15 FCC Rcd at 22741-42 ¶ 67. The definition consists of the definition of “internal system” contained in Part 90, adapted to include fixed services which are governed by Part 101 of our Rules. *Id.*

an analysis of whether the majority of users within a particular, existing band are qualified to obtain auction-exempt spectrum will be conducted, in order to determine whether that service should be designated as auction-exempt.⁹⁷ Hence, the "dominant" or "primary" use of each band will be examined.⁹⁸

34. *Discussion.* Petitioners contend that the "dominant use" test is contrary to the clear intent of Congress in implementing the exemption for public safety radio services.⁹⁹ They argue that the Commission's interpretation of the statute is based on an impermissible reading and that its construction of the section is unreasonable and thus impermissible under the *Chevron*¹⁰⁰ analysis.¹⁰¹ Petitioners also state that the Commission failed to explain the basis for the dominant use test, thus the application of the test violates part of the *Chevron* analysis.¹⁰²

35. With respect to the statutory interpretation, the petitioners argue that we lack authority under Section 309(j) of the Communications Act to conclude that spectrum in which utilities are among those eligible to hold licenses (e.g., 470-512, 800 and 900 MHz) is subject to competitive bidding because the plain language of Section 309(j) prohibits the use of competitive bidding in connection with public safety radio services, which includes services used by utilities.¹⁰³ Moreover, the petitioners assert that the statute plainly states that "services . . . that are used to protect the safety of life, health and property" are exempt.¹⁰⁴ Thus, according to the petitioners, the Commission departed from the statute's plain meaning

⁹⁷ See *id.* at 22744 ¶ 73.

⁹⁸ See *id.* For existing bands, we note that the Commission's database for wireless services, ULS, allows examination of the service code, which reflects the type of service the licensee provides and how the spectrum will be used.

⁹⁹ Cinergy Petition at 4; Commonwealth Edison Petition at 4; Consolidated Edison Petition 4; Entergy Petition at 4; KCPL Petition at 4; Omaha Petition at 4; Scana Petition at 4; Union Electric, *et al.* Petition at 4; Xcel Petition at 4.

¹⁰⁰ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); see also *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). Step 1 of the *Chevron* analysis requires the determination of whether Congress has directly spoken to the issue. If Congress has not directly spoken on the precise question at issue then Step 2 of the analysis requires a determination of whether the agency's answer is based on a permissible construction -- one that is rational and consistent with the statute -- is required. Furthermore, an agency must adequately articulate the reasons underlying its construction of a statute, so that a reviewing court can properly perform the analysis set forth in *Chevron. Acme Die Casting v. NLRB*, 26 F.3d 162, 166 (D.C. Cir. 1994).

¹⁰¹ Cinergy Petition at 11-14; Commonwealth Edison Petition at 11-14; Consolidated Edison Petition 11-14; Entergy Petition at 11-14; KCPL Petition at 11-14; Omaha Petition at 11-14; Scana Petition at 11-14; Union Electric, *et al.* Petition at 11-14; Xcel Petition at 11-14.

¹⁰² Cinergy Petition at 4, 7-10; Commonwealth Edison Petition at 4, 7-10; Consolidated Edison Petition 4, 7-10; Entergy Petition at 4, 7-10; KCPL Petition at 4, 7-10; Omaha Petition at 4, 7-10; Scana Petition at 4, 7-10; Union Electric, *et al.* Petition at 4, 7-10; Xcel Petition at 4, 7-10. Petitioners also argue that the "dominant use" test violates the Administrative Procedure Act and is arbitrary and capricious for two reasons: (1) procedurally, the Commission did not adequately explain why it used the dominant use test and how it was applied; and (2) in applying the dominant use test, the Commission did not consider the clear intent of Congress in implementing the exemption for public safety radio services.

¹⁰³ Cinergy Petition at 7-10; Commonwealth Edison Petition at 7-10; Consolidated Edison Petition at 7-10; Entergy Petition at 7-10; KCPL Petition at 7-10; Omaha Petition at 7-10; Scana Petition at 7-10; Union Electric, *et al.* Petition at 7-10; Xcel Petition at 7-10. See also UTC Petition at 2 (stating that "beyond the shared bands below 470 MHz, the negative impact of auctions upon public safety radio services in private land mobile bands would contravene the intent of Section 309(j)(2) to preserve and promote public safety radio service by utilities, pipeline companies and railroads, among others").

where spectrum is used by some incumbents to protect the safety of life, health, or property, and by others for non-public safety purposes, the "dominant use" test is a more practical approach than an "any use" test to managing the future licensing of that service in that band. Again, we emphasize that we cannot efficiently and effectively manage spectrum by exempting the specific users identified in the statutory language.¹¹³ In addition to being administratively burdensome on the Commission, this methodology would directly contravene the revised language in Section 309(j) of the Act.

38. Finally, we take this opportunity to clarify that as a practical matter, the "dominant use" analysis will be helpful in assessing the auctionability of only previously licensed bands for which no substantially new or different use is being proposed. As noted above, this issue arises only in instances where spectrum is currently used by many licensed entities to protect the safety of life, health, or property, and by others for non-public safety purposes. For instance, in the Multiple Address System (MAS) proceeding, the dominant use of each band was examined to determine whether to assign future MAS service licenses by competitive bidding.¹¹⁴ With respect to spectrum to be used for new services, we intend to adopt service rules that will specifically determine whether the service qualifies as a public safety radio service and is therefore exempt from competitive bidding. That is, when we designate spectrum as a public safety radio service, we intend to limit the permitted uses to those that Congress intended for auction-exempt spectrum (or some subset thereof).¹¹⁵

4. Protection of Life, Health, or Property

39. *Background.* As stated earlier, the public safety radio services exemption applies to private internal services used by state and local governments and non-government entities to protect the safety of life, health, or property.¹¹⁶ In the *R&O*, the Commission determined that Congress intended for the exemption to include a larger universe of services than traditional public safety services and that the services the dominant use of which is by the entities of the type identified in the Conference Report (*i.e.*, utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments) were to be included within the exemption as well.¹¹⁷ Hence, the Commission concluded that a radio service not allocated for traditional public safety uses will be deemed to be used to protect the safety of life, health or property within the meaning of Section 309(j)(2)(A)(i) if the dominant use of the service is by entities that (1) have an infrastructure that they use primarily for the purpose of providing essential public services to the public at large; and (2) need, as part of their regular mission, reliable and available communications in order to prevent or respond to a disaster or crisis affecting the public at large.¹¹⁸

40. *Discussion.* In its petition, CSAA seeks clarification as to our intent with respect to the term "public at large."¹¹⁹ Specifically, the petitioner requests that we confirm that the service provided need only be *available for use* by the public at large, rather than in actual use.¹²⁰ CSAA also wishes to clarify

¹¹³ See *supra* ¶ 28.

¹¹⁴ *MAS Report and Order*, 15 FCC Rcd 11965, 11967 ¶¶ 20, 25. See also, *R&O and FNPRM*, 15 FCC Rcd 22746 ¶ 73.

¹¹⁵ *R&O and FNPRM* at 22751 ¶ 85. We note that all existing services where some licensees use the spectrum to protect the safety of life, health, or property, and others use it for non-public safety purposes, are subject to frequency coordination requirements or other means of avoiding mutual exclusivity.

¹¹⁶ See *supra* ¶ 6. See also 47 U.S.C. § 309(j)(2)(A)(i).

¹¹⁷ See *R&O and FNPRM*, 15 FCC Rcd 22746 ¶ 75.

¹¹⁸ *Id.* at 22746-47 ¶¶ 76-78.

¹¹⁹ See CSAA Petition at 6-7.

¹²⁰ *Id.* at 1, 7.

identified for exemption from spectrum auctions. In this connection, we are working earnestly to balance the interests of various uses to meet spectral demands through spectrum allocation plans and our service rules. We should note that with respect to existing spectrum, we have made accommodations for public safety radio services as intended by Congress. For instance, in the MAS Service, the public safety radio services have access to 2.4 MHz of auction-exempt spectrum in the 900 MHz bands. With the streamlining of the service rules and the relaxation of the technical and operational rules, the service is a viable alternative for more varied uses. In addition, we have recently identified newly allocated spectrum in the 27 MHz proceeding that may be available for flexible use, including private wireless services.¹²⁸ We should note that the decisions in the *R&O* have not yet affected any current licensees of public safety radio services, because currently their services are for the most part licensed in manners that do not give rise to mutually exclusive applications,¹²⁹ which is a prerequisite for our use of competitive bidding.¹³⁰

44. With respect to future spectrum allocations, we will continue to accommodate the spectrum needs of the public safety radio services where feasible. As indicated in the *R&O*, we will designate spectrum for public safety radio services as we specifically identify and allocate available spectrum for private radio services.¹³¹ A separate designation may be created for public safety radio services and/or traditional public safety radio services as defined by Part 90, either by allocation or service rules (including eligibility requirements). We decline to speculate in this proceeding as to the amount of spectrum that will be made available for public safety radio services in the future, and will instead reserve that determination to specific proceedings. Therefore, we will continue to evaluate and consider the spectrum needs of all public safety radio services in future proceedings.

45. Additionally, on our own motion, we will take this opportunity to modify Section 1.227 of our Rules to conform it with the Balanced Budget Act and the *R&O*. Section 1.227(b)(4) discusses resolving mutually exclusive applications received by the Commission for Private Wireless Services.¹³² Specifically, the provision currently states that such cases will be consolidated for hearing or designated for random selection.¹³³ The Commission no longer utilizes random selection processes to resolve such conflicts and has indicated that it will rely on existing regulatory tools to resolve rare instances of mutually exclusive applications in services that are exempt from competitive bidding.¹³⁴ Accordingly, we will modify our rules in this regard.

D. Licensing of PLMR Channels in the 800 MHz Band for Commercial SMR Systems

46. *Background.* In the *R&O*, the Commission concluded that 800 MHz Business and I/LT licensees should be allowed to modify their licenses to permit commercial use, or to assign or transfer their licenses to commercial operators, subject to certain safeguards.¹³⁵ The Commission noted that it did

¹²⁸ See Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Notice of Proposed Rulemaking*, WT Docket No. 02-08, FCC 02-15 (Feb. 6, 2002).

¹²⁹ See *Notice*, 14 FCC Rcd at 5216-17 ¶¶ 13-14.

¹³⁰ See 47 U.S.C. § 309(j)(1).

¹³¹ See, e.g., *R&O and FNPRM*, 15 FCC Rcd at 22741 ¶ 66.

¹³² See 47 C.F.R. § 1.227(b)(4).

¹³³ See *id.*

¹³⁴ See *R&O and FNPRM*, 15 FCC Rcd at 22753 ¶ 91. See also Balanced Budget Act § 3002(a)(2)(B)(5). The 1997 amendments eliminate the Commission's authority to issue licenses or permits by random selection after July 1, 1997, with the exception of licenses or permits for noncommercial educational radio television stations. *Id.*

¹³⁵ *Id.* at 22760-64 ¶¶ 109-119.

Also, we note that 800 MHz PLMR licensees can receive an extended implementation period for of up to five years, if they demonstrate that such a period is required to construct the proposed wide-area system.¹⁴⁶ One of our goals in requiring a holding period is to ensure that these channels will continue to be initially licensed only to entities that will use them for PLMR communications. As noted in the *R&O*, a holding period of less than five years could undermine this goal by allowing many wide-area licensees to modify or transfer their licenses for commercial use upon construction.¹⁴⁷ AllCom has not demonstrated that the balance struck in the *R&O* between flexibility and conditions, including the five year holding period, should be reconsidered at this time.¹⁴⁸

49. We take this opportunity to address other issues related to licensing of PLMR channels in the 800 MHz band for use in commercial systems. When the Commission adopted rules permitting modification, assignment, or transfer of PLMR licenses for commercial use, it provided that such applications were to be filed and processed in accordance with the rules and procedures governing other applications for Business and I/LT channels.¹⁴⁹ Our experience has demonstrated that it would be administratively easier for applicants and Commission staff if these applications were filed and processed in accordance with our rules and procedures for commercial stations, instead. We will amend the rule accordingly. Additionally, we will amend the rule to clarify that a licensee that has modified its authorization for use in a commercial operation, or a commercial operator that acquired PLMR channels via assignment or transfer, may at any time submit a modification application to indicate that the subject frequencies will be used in a PLMR system, provided that the licensee meets the applicable eligibility requirements.

50. Finally, we note that Section 90.621(e)(2), as amended in the *R&O*, authorizes modification and assignment of PLMR licenses "for commercial operation." The text of the *R&O*, however, spoke in terms of "CMRS use."¹⁵⁰ We take this opportunity to clarify that the rule authorizes modification or assignment of PLMR licenses for any SMR use, whether that use is classified as Commercial Mobile Radio Service ("CMRS") or PMRS.¹⁵¹ Consistent with this determination, the requirement that any such application must include a certification that written notice of the modification application has been provided to certain public safety licensees,¹⁵² therefore, is also applicable to all modification and assignment applications pursuant to Section 90.621(e)(2), whether the intended SMR commercial operation is classified as CMRS or PMRS.

E. Section 337 Licensing for Public Safety Services

51. *Background.* The Balanced Budget Act added a new Section 337 to the Communications Act. Section 337 of the Communications Act, *inter alia*, provides certain public safety entities the

¹⁴⁶ See 47 C.F.R. § 90.629.

¹⁴⁷ *R&O and FNPRM*, 15 FCC Rcd 22763 ¶ 115.

¹⁴⁸ In addition, subsequent applications to modify the technical parameters of stations the licenses for which have been modified to permit commercial operations will be scrutinized to prevent evasion of the five-year holding period. For example, a request to relocate the station to serve an area other than that covered by the station's prior PLMR operations (or any relocation which together with previous post-modification relocations produces such a cumulative effect) would be denied.

¹⁴⁹ *Id.* at 22786; see 47 C.F.R. § 90.621(e)(2).

¹⁵⁰ See 47 C.F.R. § 90.621(e)(2); *R&O and FNPRM*, 15 FCC Rcd at 22760-61 ¶ 110.

¹⁵¹ Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services, *Second Report and Order*, GN Docket 93-252, 9 FCC Rcd 1411, 1450-51 ¶¶ 88-93 (1994) (noting that SMR systems may be classified as either CMRS or PMRS).

¹⁵² 47 C.F.R. § 90.621(e)(2)(iii).

propagation characteristics, number of stations needed to cover an area.¹⁶⁰ APCO asserts that the Commission's interpretation will undermine interoperability among public safety users because incompatible spectrum would be required to be used instead of spectrum from the desired band.¹⁶¹ APCO argues that spectrum other than the desired spectrum is simply not a reasonable alternative and is therefore not immediately available.¹⁶²

54. None of APCO's arguments persuade us to reconsider the conclusion in the *R&O* that the language and legislative history of Section 337(c)(1)(A) clearly require that no other spectrum allocated to public safety services be available without any qualification. As the Association of American Railroads (AAR) points out, Congress did not include any considerations for cost or technical feasibility in the legislative history or the actual statute,¹⁶³ and the Conference Report's use of the words "spectrum" and "frequency" is not qualified, modified or conditioned in any way.¹⁶⁴ The Conference Report states, "Spectrum must not be immediately available on a frequency already allocated to public safety services."¹⁶⁵ We concur with the Wireless Telecommunications Bureau's assessment, in several matters, that the lack of spectrum in a particular desired band or bands does not satisfy the statutory requirements.¹⁶⁶ With respect to APCO's assertion that effect must be given, if possible, to every word, clause and sentence of a statute,¹⁶⁷ we agree. We believe, however, that the legislative language "to satisfy the requested public safety use" is properly interpreted to reference the types of use set forth in the table of allocations such as allocations for fixed or mobile use, rather than some specific frequency band deemed desirable by the applicant. Therefore, we decline to adopt APCO's statutory interpretation of Section 337(c)(1)(A).

55. APCO also requests reconsideration of the stricter standard applied to Section 337 applications received after the announcing public notice is released.¹⁶⁸ APCO asserts that any time-sensitive periods would have been identified in the statute or in the legislative history as it was with Section 337(c)(1)(D).¹⁶⁹ APCO argues that the Commission's interpretation is inconsistent with the clear language of the statute and Congressional intent.¹⁷⁰

56. We affirm the decision to consider the state of the competitive bidding process when the

¹⁶⁰ APCO Petition at 6.

¹⁶¹ *Id.* at 4-5.

¹⁶² APCO Reply to Opposition at 3.

¹⁶³ AAR Opposition at 5-6.

¹⁶⁴ *Id.* at 6.

¹⁶⁵ See Conference Report at 579-80.

¹⁶⁶ See New Hampshire Department of Transportation, *Memorandum Opinion and Order*, 14 FCC Rcd 19438 (WTB 1999) (dismissing the Section 337 application and waiver request because applicant failed to show that no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use); Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645 (WTB 2000) (dismissing the Section 337 application and waiver request because applicant failed to show that no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use). See also County of Burlington, New Jersey, *Order on Reconsideration*, 15 FCC Rcd 16569 (WTB 2000) (granting the Section 337 application because applicant provided an engineering study and an APCO study showing that no public safety spectrum is available in any band).

¹⁶⁷ APCO Petition at 3-4.

¹⁶⁸ *Id.* at 6-7.

¹⁶⁹ *Id.* at 7.

¹⁷⁰ *Id.*

Commission has not performed one.

C. Further Information

61. For further information concerning this *Memorandum Opinion and Order*, contact Karen Franklin of the Public Safety and Private Wireless Division at (202) 418-0680, TTY (202) 418-7233, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Jenifer Simpson at (202) 418-0008, TTY (202) 418-2555. This *Memorandum Opinion and Order* can be downloaded at <http://www.fcc.gov/Wireless/Orders/2001>.

VI. ORDERING CLAUSES

62. Accordingly, pursuant to Sections 1, 2, 4(i), 5(c), 7(a), 11(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 155(c), 157(a), 161(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351, the Balanced Budget Act of 1997, Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997), and Sections 1.421 and 1.425 of the Commission's Rules, 47 C.F.R. §§ 1.421 and 1.425, IT IS ORDERED that the *Memorandum Opinion and Order* is hereby ADOPTED.

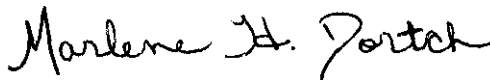
63. IT IS FURTHER ORDERED that Parts 1 and 90 of the Commission's Rules ARE AMENDED as set forth in Appendix B, and that these Rules shall be effective [60 days after publication in the Federal Register].

64. IT IS FURTHER ORDERED that the Petitions for Reconsideration submitted by the following parties are DENIED: AllCom, LLC; American Automobile Association; Association of Public-Safety Communications Officials-International; Central Station Alarm Association; Cinergy Corporation; Commonwealth Edison Company; Consolidated Edison Company of New York; Entergy Corporation; Kansas City Power & Light Company; Omaha Public Power District; SCANA; Union Electric Company and Central Illinois Public Service Company and Ameren Energy Generating Company; United Telecom Council; and Xcel Energy, Inc.

65. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

66. IT IS FURTHER ORDERED that the Motion to Accept Supplemental Comments submitted by Industrial Telecommunications Association, Inc. is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A**Pleadings Filed in WT Docket 99-87****Petitions for Reconsideration**

AllCom, LLC (AllCom)
American Automobile Association (AAA)
Association of Public-Safety Communications Officials-International (APCO)
Central Station Alarm Association (CSAA)
Cinergy Corporation (Cinergy)
Commonwealth Edison Company (Commonwealth Edison)
Consolidated Edison Company of New York (Consolidated Edison)
Entergy Corporation (Entergy)
Kansas City Power & Light Company (KCPL)
Omaha Public Power District (Omaha)
SCANA Corporation (SCANA)
Union Electric Company and Central Illinois Public Service Company and Ameren Energy Generating Company (Union Electric)
United Telecom Council (UTC)
Xcel Energy, Inc.

Oppositions to Petitions for Reconsideration

Association of American Railroads (AAR)
Personal Communications Industry Association, Inc. (PCIA)

Replies to Oppositions to Petitions for Reconsideration

APCO
AllCom

APPENDIX B

FINAL RULES

Parts 1 and 90 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Section 1.913 is amended by revising paragraph (g) to read as follows:

§ 1.913 Application forms; electronic filing and manual filing.

* * * * *

(g) *Section 337 Requests.* Applications to provide public safety services submitted pursuant to 47 U.S.C. 337 must be filed on the same form and in the same manner as other applications for the requested frequency(ies), except that applicants must select the service code reflective of the type of service the applicant intends to provide.

3. Section 1.227 is amended by revising (b)(3)(ii) and (b)(4) to read as follows:

§ 1.227 Consolidations.

* * * * *

(b) * * * * *

(3) * * * * *

(ii) *Domestic public fixed and public mobile.* See Rule § 21.31 for the requirements as to mutually exclusive applications. See also Rule § 21.23 for the requirements as to amendments of applications.

* * * * *

(4) This paragraph applies when mutually exclusive applications subject to section 309(b) of the Communications Act and not subject to competitive bidding procedures pursuant to § 1.2102 of this chapter are filed in the Private Radio Services, or when there are more such applications for initial licenses than can be accommodated on available frequencies. Except for applications filed under part 101, subparts H and O, Private Operational Fixed Microwave Service, mutual exclusivity will occur if the later application or applications are received by the Commission's offices in Gettysburg, PA (or Pittsburgh, PA for applications requiring the fees set forth at part 1, subpart G of the rules) in a condition acceptable for filing within 30 days after the release date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing or within such other period as specified by the Commission. For applications in the Private Operational Fixed Microwave Service, mutual exclusivity will occur if two or more acceptable applications that are in conflict are filed on the same day.

* * * * *

APPENDIX C

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY

1. As required by the Regulatory Flexibility Act (RFA),¹⁷⁴ Initial Regulatory Flexibility Analyses (IRFA) were incorporated in the *Notice of Proposed Rule Making (Notice)*¹⁷⁵ and *Report and Order and Further Notice of Proposed Rule Making (R&O and FNPRM)* in WT Docket 99-87.¹⁷⁶ The Commission sought written public comment on the proposals in the *Notice* and *R&O and FNPRM*. This Supplemental Final Regulatory Flexibility Analysis (SFRFA) contained in this *Memorandum Opinion and Order (MO&O)* is limited to matters raised on reconsideration or clarification with regard to the *R&O and FNPRM* and addressed in this *MO&O*. This SFRFA conforms to the RFA.¹⁷⁷

I. Reason for, and Objectives of, the *Memorandum Opinion and Order*

2. This proceeding was initiated to secure public comment on proposals to implement Sections 309(j) and 337 of the Communications Act of 1934 ("Communications Act"), as amended by the Balanced Budget Act of 1997 ("Balanced Budget Act").¹⁷⁸ The Balanced Budget Act significantly revised Section 309(j) of the Communications Act, which is the principal statutory provision that governs the Commission's auction authority for the licensing of radio services.

II. Summary of Significant Issues Raised by Public Comments in Response to the Previous Final Regulatory Flexibility Analysis.

3. No reconsideration petitions/comments were filed in direct response to the previous Final Regulatory Flexibility Analysis (FRFA). However, the Commission has reviewed general comments that may impact small businesses. The *Report and Order* in this proceeding determined that the statutory changes in Section 309(j)(1) and exemptions in Section 309(j)(2) are considered in light of the Commission's continuing obligation under Section 309(j)(6)(E) to avoid mutual exclusivity and to fulfill the public interest objectives enumerated in Section 309(j)(3). The Commission also concluded that in non-exempt services, the Commission's authority under the Balanced Budget Act continues to permit it to adopt licensing processes that result in the filing of mutually exclusive applications where the Commission determines that such an approach would serve the public interest. The Commission concluded that in addition to other licensing mechanisms we have used previously, we should consider the use of band manager licensing as a future option for private as well as commercial services. In the *Report and Order*, the Commission determined that the public safety exemption applies only to services in which these public safety uses, *i.e.*, protection of safety of life, health, and property within the meaning of Section 309(j)(2)(A), comprise the dominant use of the spectrum. Further, the Commission decided

¹⁷⁴ See U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁷⁵ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, 15 FCC Rcd 22709 (1999) ("*R&O and FNPRM*").

¹⁷⁶ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, *Notice of Proposed Rule Making*, WT Docket No. 99-87, RM-9332, RM-9405, 14 FCC Rcd 5206 (1999) ("*Notice*").

¹⁷⁷ See 5 U.S.C. § 604.

¹⁷⁸ Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

9. This *MO&O* makes two minor revisions to the compliance requirements in Parts 1 and 90 of the Commission's Rules to conform the application and licensing procedures in the private land mobile and public safety radio services with the policies described in the *MO&O*. One of the amendments requires processing of modification applications submitted to convert the use of 800 MHz PLMR channels to use in a CMRS operation in accordance with our CMRS rules and procedures. The other amendment to our rules requires a Section 337 applicant to enter the service code applicable to the type of service the applicant intends to provide.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

10. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁹¹

11. The Part 1 rule adopted in this *MO&O* clarifies our policies with respect to the processing of applications for licenses in the public safety radio services under Section 337 of the Act. The revision to Part 1 of the Commission's Rules provides guidance toward accurate completion of FCC Form 601. This form requires the applicant to provide a service code. Although we did consider allowing a Section 337 applicant to enter a service code commensurate with the frequency allocation, other applicants, frequency coordinators or other licensees would not know the type of service provided on the subject frequency. Moreover, we observe that selection of a service code is not a unique requirement for small business, Section 337 applicants; nor does selection of one service code instead of another service code impose an additional economic burden.

12. The Part 90 regulation amended by this *MO&O* designates the rules governing CMRS operations as the rules by which applications submitted to convert the use of PLMR channels to use in CMRS operations will be processed rather than the rules governing Industrial/Land Transportation and Business channels. While a small business, 800 MHz PLMR licensee who chooses to convert use of its frequencies and operate a CMRS system may have to familiarize itself with the CMRS rules, it is incumbent upon this agency, *inter alia*, to make such regulations as it may deem necessary to prevent interference between stations.¹⁹² For instance, use of PLMR channels in CMRS operations must comply with the interference and technical requirements that govern CMRS operations to ensure harmful interference to existing licensees is avoided. Similarly, use of PLMR channels in CMRS operations must comply with the power limitations and other operational requirements imposed upon other CMRS operators to protect licensees from harmful interference.

Report to Congress: The Commission will send a copy of this *Memorandum Opinion and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Memorandum Opinion and Order*, including Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

¹⁹¹ See 5 U.S.C. § 603(c).

¹⁹² See 47 U.S.C. § 303(f).

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4(i), 11, 303(g), 303(r) and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. Section 90.621 is amended by revising paragraph (e)(2) and adding paragraph (e)(3) to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(e) * * * * *

(2) Notwithstanding paragraph (e)(5) of this section, licensees of channels in the Industrial/Land Transportation and Business categories may request a modification of the license, *see* § 1.947 of this part, to authorize use of the channels for commercial operation. The licensee may also, at the same time or thereafter, seek authorization to transfer or assign the license, *see* § 1.948 of this part, to any person eligible for licensing in the General or SMR categories. Applications submitted pursuant to this paragraph must be filed in accordance with the rules governing other applications for Commercial Mobile Radio Service channels, and will be processed in accordance with those rules. Grant of requests submitted pursuant to this paragraph is subject to the following conditions:

* * * * *

(3) Licensees granted authorizations pursuant to paragraph (e)(2) of this section may at any time request modification of the license to authorize use of the channels consistent with the rules governing the category to which they are allocated, provided that the licensee meets the applicable eligibility requirements.

* * * * *

Section 337 application is received as relevant to our determination of whether grant of the waiver request and the associated application(s) is in the public interest, as required by subsection (c)(1)(E). As the Commission noted in the *R&O*, the later in the proceedings a Section 337 application is filed, the greater the impact on the Commission's competitive bidding process and on prospective bidders' plans.¹⁷¹ We also affirm the decision to make these determinations on a case-by-case basis.

57. Additionally, we note that the Commission required that Section 337 applicants file in the same manner and on the same form(s) as ordinary applicants for the subject spectrum.¹⁷² In order to further facilitate the processing of Section 337 applications, we now modify the rule to require applicants to enter the service code applicable to the type of service they intend to provide.¹⁷³

IV. CONCLUSION

58. In this *MO&O*, we adhere to the conclusion that the amendments to Section 309(j) do not preclude the Commission from using licensing mechanisms for private services that result in the filing of mutually exclusive applications if it is in the public interest to do so. Additionally, we affirm the determination in the *R&O* that the public service radio services exemption in 309(j) applies to services rather than users. We believe that this analysis of the statute reflects the plain language of the statute as well as congressional intent. Moreover, we affirm the dominant use test set forth in the *R&O* as the means to determine whether the particular service qualifies for the public safety radio services exemption. We also retain the five-year holding period as a requirement for modification of an 800 MHz PLMRS authorization to permit commercial use. Finally, with respect to implementation of Section 337 of the Act, we affirm the decisions in the *R&O* that an applicant must demonstrate that there is no public safety spectrum available before it can be granted a waiver pursuant to Section 337, and that the stage of the competitive bidding process is one of many factors that will be evaluated on a case-by-case basis to determine satisfaction of the public interest criterion. We believe that the conclusions drawn herein reflect congressional intent and will result in appropriate implementation of Section 309(j) and 337 of the Communications Act of 1934, as amended. Further, these conclusions will advance effective and efficient spectrum management.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

59. As required by the Regulatory Flexibility Act (RFA), see 5 U.S.C. § 604, the Commission has prepared a Supplemental Regulatory Flexibility Analysis of the possible impact of the rule changes contained in this *Memorandum Opinion and Order* on small entities. The Supplemental Regulatory Flexibility Analysis is set forth in Appendix C. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Paperwork Reduction Act of 1995 Analysis

60. This *Memorandum Opinion and Order* does not contain any new or modified information collection. Therefore, it is not subject to the requirements for a paperwork reduction analysis, and the

¹⁷¹ *R&O and FNPRM*, 15 FCC Rcd at 22769-70 ¶¶ 133-35.

¹⁷² *See id.* at 22770-71 ¶ 136; 47 C.F.R. § 1.913(g).

¹⁷³ We note that Section 337 applicants nonetheless will be required to meet the interference protection standards in our rules applicable to the subject spectrum in order to satisfy Section 337(c)(1)(B). Consequently, applicants should review the relevant rules and include the necessary information in their waiver request.

opportunity to apply for unused spectrum not otherwise allocated for public safety use. The terms and conditions under which an eligible entity may apply to the Commission for spectrum under Section 337 are provided at subsection (c)(1) of Section 337 as follows:

(c) Licensing of Unused Frequencies for Public Safety Services.--

(1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that--

- (A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;
- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
- (E) granting such application is consistent with the public interest.¹⁵³

52. In the *R&O*, the Commission concluded that Section 337(c)(1)(A) requires that the applicant demonstrates that there is no available public safety spectrum in any band in the geographic area where the public safety use is proposed.¹⁵⁴ The Commission also concluded that the state of the competitive bidding process when the Section 337 application is received is relevant to our determination of whether grant of the waiver request and the associated application(s) is in the public interest, as required by subsection (c)(1)(E).¹⁵⁵ In particular, the Commission stated that it will balance a variety of factors, such as the likelihood that the spectrum will be auctioned, the likely timetable for such an auction, and the effect that grant of the request may have on such a future auction, against the stated needs of the applicant and our obligation to promote public safety.¹⁵⁶ Moreover, the Commission decided that once the mechanisms for a particular spectrum auction are in place, beginning with the issuance of a public notice announcing the date of the auction, the competitive bidding process is substantially underway, and only in highly extraordinary circumstances would grant of a Section 337 request be in the public interest.¹⁵⁷

53. *Discussion.* First, APCO requests reconsideration of the determination that an applicant must demonstrate that there is no available public safety spectrum in any band in the geographic area where the public safety use is proposed.¹⁵⁸ APCO argues that a portion of Section 337(c)(1)(A) -- "to satisfy the requested public safety service use" -- is being ignored and not given statutory effect.¹⁵⁹ APCO also claims that the Commission's interpretation ignores the difference in public safety bands, *i.e.* equipment,

¹⁵³ See 47 U.S.C. § 337(c)(1).

¹⁵⁴ *R&O and FNPRM*, 15 FCC Rcd at 22769 ¶ 132.

¹⁵⁵ *Id.* at 22769 ¶ 133.

¹⁵⁶ See 47 U.S.C. § 151.

¹⁵⁷ *R&O and FNPRM*, 15 FCC Rcd at 22770 ¶ 135.

¹⁵⁸ APCO Petition at 3-6.

¹⁵⁹ *Id.* at 3-4; APCO Reply to Opposition at 2.

not want to facilitate trafficking of PLMR spectrum, *i.e.*, PLMR eligibles acquiring new licenses from the existing pool of unassigned frequencies for the purpose of selling them to commercial providers.¹³⁶ In that connection, it amended our rules to permit modification to commercial use or assignment to a commercial operator only in the case of PLMR licenses that were initially granted at least five years prior to the modification, transfer, or assignment.¹³⁷ However, it decided not to apply this five-year holding period to licenses already granted, or for which the application already was filed, as of the adoption date of the *R&O and FNPRM* because prior to then, no speculative incentive to acquire Business and I/LT frequencies can be inferred.¹³⁸

47. *Discussion.* AllCom filed a petition requesting that the five-year holding period be reconsidered and deleted.¹³⁹ AllCom argues that the five-year holding period is unnecessary because the rules already prohibit the assignment of unconstructed 800 MHz frequency assignments, which creates a *de facto* holding period.¹⁴⁰ Additionally, it argues that the holding period may prevent non-speculative transactions and is therefore contrary to the public interest.¹⁴¹ AllCom also suggests that imposing a holding period is contrary to the Commission's decision allocating 220-222 MHz band spectrum without eligibility restrictions.¹⁴² Alternatively, AllCom asks that the holding period be reduced to one year, or that the Commission indicate that it will favorably review waiver requests of the holding period where the parties can demonstrate that there is no trafficking involved.¹⁴³ The Personal Communications Industry Association (PCIA) filed an Opposition to AllCom's Petition stating that it supports anti-trafficking measures and opines that the elimination of the restrictions would result in the wholesale reallocation of the 800 MHz Business and I/LT categories to SMR entities.¹⁴⁴

48. AllCom has not persuaded us that the five-year holding period is unnecessary or excessive. Consequently, we affirm the determinations in the *R&O* and maintain the five-year holding period for those licensees where the applications were filed after the adoption of the *R&O and FNPRM*, or where the spectrum assignment or service area was increased after that date. We continue to believe that a five-year holding period is appropriate because such a requirement has been applied to other situations where speculation and trafficking were concerns. For example, our rules provide that licensees are subject to unjust enrichment payments for any license transfer that occurs within five years of the license grant.¹⁴⁵

¹³⁶ The Commission has defined as trafficking as "speculation, barter or trade in licenses." See KaStar 73 Acquisition, LLC and KaStar 109.2 Acquisition, LLC, Applications for Consent to Transfer Control, *Memorandum Opinion and Order*, 15 FCC Rcd 1615, 1619-20 ¶ 12 (1999).

¹³⁷ *R&O and FNPRM*, 15 FCC Rcd at 22763 ¶ 115; see 47 C.F.R. § 90.621(e)(2). In addition, in the case of licenses that have been modified to add 800 MHz Business or I/LT frequencies or to add or relocate base stations that expand the licensee's interference contour, commercial use of those frequencies or base stations may not be requested until five years after the modification. 47 C.F.R. § 90.621(e)(2)(ii).

¹³⁸ *Id.* at 22763 ¶ 116.

¹³⁹ AllCom Petition at 2.

¹⁴⁰ *Id.* at 2-3 n.3.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 4 (citing Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services and Implementation of Section 309(j) of the Communications Act, *Third Report and Order; Fifth Notice of Proposed Rule Making*, PR Docket No. 89-552, GN Docket No. 93-252 and PP Docket No. 93-253, 12 FCC Rcd 10943, 10968-10969 ¶¶ 51-52 (1982)).

¹⁴³ AllCom Petition at 5.

¹⁴⁴ PCIA Opposition at 2.

¹⁴⁵ See 47 C.F.R. § 1.2111(b)(1).

the criterion that reliable and available communications are needed to respond to a disaster or crisis affecting the public at large, and adds that alarm companies use radios to signal the occurrence of events that by definition are life-threatening (*i.e.*, fire, burglary, medical emergencies).¹²¹

41. We do not agree with CSAA's approach to examining the "protection of life, health, or property" standard. CSAA suggests that alarm monitoring companies should be deemed to serve the public at large because they make their services available to any member of the public who wishes to subscribe.¹²² This interpretation is overbroad and, indeed, would apply to just about any entity that is open for business. Rather, as used in the *R&O*, the term "public at large" refers to the recipients of "essential public services" referenced therein. When the Commission stated that the entity must have an infrastructure it uses primarily for the purpose of providing essential public services to the public at large, it intended for the entity to provide essential public services to a large portion of the population, as do utilities. As stated in the *R&O*, one of the characteristics of a service that protects the safety of life, health, or property is that the public at large depends on this service, which affects their daily lives and where accidents or service interruptions may have dangerous consequences to a significant number of people.¹²³ We recognize that alarm companies provide important functions to its subscribers for which reliable and available communications are needed to facilitate the prevention of some potentially life-threatening hazards. Nonetheless, we do not believe that alarm and/or alarm monitoring services concern a large part of the population to the extent that the wider community would be detrimentally affected by a disruption in the service. Furthermore, our approach to determining whether a particular use protects the safety of life, health or property ensures that only those services that Congress clearly intended to exempt from auction are exempt, and is consistent with Congress's amendment to Section 309(j)(1) to expand the definition of auctionable services.

5. General Clarification

42. UTC generally commends the *R&O*.¹²⁴ While it recognizes the "general framework" provided for exercising the expanded auction authority with regard to private wireless services, UTC seeks general clarification with respect to the following issues: (1) whether there will be future allocations for public safety radio services; (2) if so, whether such allocations will be available for all users of public safety radio services; (3) in what, if any, way will utilities, pipelines, metropolitan transit systems and railroads have access to existing allocations of public safety radio service spectrum; and (4) whether the Commission will limit the impact upon public safety radio service eligibles that might result from any licensing changes in existing or future allocations.¹²⁵ According to UTC, existing spectrum allocations are increasingly congested and subject to interference, and therefore must be preserved for public safety radio services, particularly utilities, pipelines and railroads.¹²⁶ Moreover, UTC adds that sources of spectrum must be supplied for public safety radio services immediately.¹²⁷

43. We understand UTC's concern about adequate spectrum availability for all of the services that fall within the scope of the public safety radio services exemption. We also realize that Congress has recognized that the public safety radio services have special spectral needs as they have been specifically

¹²¹ *Id.* at 7.

¹²² *Id.*

¹²³ See *R&O and FNPRM*, 15 FCC Rcd at 22747 ¶ 77.

¹²⁴ See, e.g., UTC Petition at 2 ("Council praises the FCC's determination that current shared frequency bands will not be subjected to the agony, and in some cases, administrative impossibility of geographic overlays and auctions").

¹²⁵ *Id.* at 2-7.

¹²⁶ *Id.* at 4-5.

¹²⁷ *Id.*

by interpreting the statute to mean services that are predominantly used to protect the safety of life, health and property are exempt from auction.¹⁰⁵

36. We conclude that the “dominant use” analysis is lawful, as it is consistent with Congress’s intent for the public safety radio services auction exemption. Petitioners essentially argue that Congress intended to exempt from auction any spectrum that is used anywhere in the country by any licensee for a use that protects the safety of life, health, or property. As set forth in the preceding discussion and as indicated by petitioners herein, Congress clearly stated that exemption to auction would apply to public safety radio “services,” not “users” or “licensees.”¹⁰⁶ In addition, Congress’s purpose in revising our auction authority in Section 309(j)(1) was to expand the universe of auctionable spectrum beyond subscriber-based services, and thereby reduce the scope of auction-exempt uses.¹⁰⁷ As the Commission explained in the *R&O*, “[t]o interpret the exemption for public safety radio services in Section 309(j)(2)(A) in a manner that effectively negates the changes to Section 309(j)(1) would not be reasonable.”¹⁰⁸ Given the “mixed use” of the bands discussed by the petitioners, their proposed interpretation of Section 309(j)(2) would actually include more users within the scope of the exemption because it considers both private internal radio services as well as non-private internal radio services. Moreover, nothing in the statute or legislative history indicates that Congress intended for significant numbers of licensees in “mixed use” bands that do not use spectrum to protect the safety of life, health, or property to have access to auction-exempt spectrum.¹⁰⁹ Accordingly, we believe that implementation of the “dominant use” standard is proper.

37. The Commission previously stated that Section 309(j)(6)(E) provides the Commission with the discretion to take into account the dominant use of the spectrum, administrative efficiency and other related licensing issues.¹¹⁰ In the *R&O*’s discussion of the dominant use analysis, the Commission posed a threshold question concerning the proportion of users in a given band that must be the type of user that Congress intended to be able to make use of exempt spectrum, in order for the service to be deemed a public safety radio service.¹¹¹ In exploring the available options, it examined the issue of characterizing varied operations located in “mixed use” bands in the context of other proceedings. In this connection, it concluded that precedent for examining the dominant or primary use of the band exists and that this approach promotes Congressional intent.¹¹² Thus, in an existing service in a particular frequency band

(...continued from previous page)

¹⁰⁴ Cinergy Petition at 4, 8-9; Commonwealth Edison Petition at 4, 8-9; Consolidated Edison Petition at 4, 8-9; Entergy Petition at 4, 8-9; KCPL Petition at 4, 8-9; Omaha Petition at 4, 8-9; Scana Petition at 4, 8-9; Union Electric, *et al.* Petition at 4, 8-9; Xcel Petition at 4, 8-9.

¹⁰⁵ Cinergy Petition at 4, 8-9; Commonwealth Edison Petition at 4, 8-9; Consolidated Edison Petition at 4, 8-9; Entergy Petition at 4, 8-9; KCPL Petition at 4, 8-9; Omaha Petition at 4, 8-9; Scana Petition at 4, 8-9; Union Electric, *et al.* Petition at 4, 8-9; Xcel Petition at 4, 8-9.

¹⁰⁶ See *supra* ¶¶ 23-28.

¹⁰⁷ See, e.g., *R&O and FNPRM*, 15 FCC Rcd at 22715-16 ¶ 14; Conference Report.

¹⁰⁸ *R&O and FNPRM*, 15 FCC Rcd at 22748 ¶ 79.

¹⁰⁹ Indeed, the Conference Report provided an in-depth discussion distinguishing not-for-profit road services, such as AAA, and for-profit road services. See Conference Report at 572 (noting the value of the public safety service provided by emergency road services and stating that the exemption does not include internal radio services used to support emergency road services as part of a competitive marketing package).

¹¹⁰ See Amendment of the Commission’s Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11956, 11962 ¶ 12 (2000) (citing *DirecTV, Inc. v. FCC*, 110 F.3d 816, 828 (1997)) (*MAS R&O*).

¹¹¹ See *R&O and FNPRM*, 15 FCC Rcd at 22744 ¶ 73; see also Notice, 14 FCC Rcd at 5225 ¶ 30.

¹¹² See *R&O and FNPRM*, 15 FCC Rcd at 22744 ¶ 73 (citing *MAS R&O*, 15 FCC Rcd at 11965 ¶ 20, 11967 ¶ 25).

31. *Discussion.* CSAA, which represents entities that provide central station alarm security protection services, requests clarification of the Commission's definition of "private internal radio service."⁸⁸ In this connection, CSAA suggests that the Commission slightly modify its definition of "private internal radio service" by removing the reference to "of the licensee."⁸⁹ Hence, according to CSAA, the definition should read "a service in which the licensee does not make a profit, and all the messages are transmitted between fixed operating positions located on premises controlled by the licensee and the associated fixed or mobile stations or other transmitting or receiving devices, or between mobile stations or other transmitting or receiving devices."⁹⁰ Based on its suggested modification, it appears that petitioner is concerned about the definition's requirement that "the associated fixed or mobile stations or other transmitting or receiving devices" be "of the licensee" because end units in alarm systems are often purchased by the subscriber and found in the subscriber's home.⁹¹ CSAA states that the radios located on customer premises can be remotely controlled from the alarm company central station.⁹² CSAA adds that the channels designated by the Commission for the exclusive use of central station alarm companies are used to provide "private internal radio services" despite the fact that alarm company remote transmitters may be located on a customer's premises.⁹³

32. We do not believe that the suggested change to the "private internal services" definition is necessary. The Commission has determined in another context (the Multiple Address Systems (MAS) Service with respect to security alarm monitoring services) that the associated devices to which CSAA makes reference may be part of an internal system.⁹⁴ Moreover, the Commission stated that the principles underlying the definitions of "private internal" in the MAS rules and in the *R&O* in this proceeding are the same, and that a service which is private internal for MAS purposes is also private internal for purposes of applying the auction exemption for public safety radio services.⁹⁵ Therefore, we will retain the current "private internal radio system" definition as set forth in the *R&O*. Our decision in this regard is in the public interest, as it will enable us to effectively accommodate central station alarm companies while fostering consistency among pertinent wireless communications service rules.

3. Dominant Use Analysis

33. *Background.* Because the exemption applies to radio services, rather than individual users or specific users, the Commission addressed the question of what proportion of the users of a given band must be of the type that Congress intended to have access to auction-exempt spectrum, in order for the service to be deemed a public safety radio service.⁹⁶ In this connection, the Commission concluded that

⁸⁸ CSAA Petition at 4.

⁸⁹ *Id.*

⁹⁰ *Id.* at 4-5.

⁹¹ *See id.* at 4-5. With respect to alarm monitoring services, fixed passive telemetry devices, either two-way transceivers polled by stations, or one-way transmitters programmed to send messages to stations at certain intervals are installed at end users' premises.

⁹² *Id.* at 5.

⁹³ *Id.*

⁹⁴ *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Memorandum Opinion and Order*, WT Docket No. 97-81, 16 FCC Rcd 12181, 12187 ¶ 11 (2001). Generally, the private internal definition contained in the MAS proceeding was drafted to specifically deal with services offered under MAS, while the definition in the Balanced Budget Act proceeding was drafted for any service. Thus, the uses that are deemed private internal in the context of MAS will also be deemed private internal with regard to examining the types of spectrum uses against the definition contained in the Balanced Budget Act proceeding.

⁹⁵ *Id.* at 12186 n.26.

⁹⁶ *See R&O and FNPRM*, 15 FCC Rcd at 22744 ¶¶ 72-73.

would be able to obtain a license to provide traditional CMRS offerings without participating in the competitive bidding process, while other CMRS operators would have to pay for such a license after participating in (and winning in) the competitive bidding process. Further, we believe that Congress did not intend for the exemption to apply to spectrum that is predominantly used by entities that do not use it to protect the safety of life, health or property. Thus, we conclude that the *R&O*'s interpretation of the public safety radio services exemption is an accurate analysis of the statute, consistent with Congress's objectives.

27. This analysis is not changed by *National Public Radio, Inc. v. FCC*,⁷² which was decided after the petitions for reconsideration of the *R&O* were filed. In that case, noncommercial educational broadcasters (NCEs) challenged the Commission's policy of not exempting NCEs from participating in auctions when they apply for spectrum outside of that specifically designated for NCE use.⁷³ The D.C. Circuit held that the exemption from competitive bidding for NCEs, 47 U.S.C. § 309(j)(2)(C), exempts NCEs from participating in auctions for any broadcasting spectrum, whether or not the spectrum has been reserved for noncommercial educational use.⁷⁴ Because Section 309(j)(2)(C) specifically exempts NCE "stations," the court concluded that the NCE exemption "is based on the nature of the station that ultimately receives the license, not on the part of the spectrum in which the station operates."⁷⁵ In contrast, the exemption in Section 309(j)(2)(A) does not "refer[] to the ultimate recipient of the license."⁷⁶ Instead, as noted above, it specifically refers to "public safety radio services" used by public safety entities, not public safety stations or licensees themselves. Thus, we believe that the *NPR* court's "plain language" analysis supports the Commission's interpretation of Section 309(j)(2)(A) set forth in the *R&O*.

28. Moreover, the approach taken in the *R&O* is practical because it allows the Commission to manage spectrum efficiently in a manner consistent with its obligations under the Communications Act.⁷⁷ Section 309(j)(3) directs the Commission to promote specified public interest objectives in determining which classes of licenses and permits should be assigned by competitive bidding, which necessarily requires the Commission to consider in each case whether to adopt a licensing mechanism that allows for mutual exclusivity.⁷⁸ Once it has decided to use competitive bidding to assign licenses for a particular band and service, permitting public safety entities to override the designation of spectrum as auctionable would undermine the Commission's expanded auction authority.⁷⁹ As the Commission has previously

⁷² *National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (*NPR*).

⁷³ *Id.* at 227. See generally Reexamination of the Comparative Standards for Noncommercial Educational Applicants, *Second Notice of Proposed Rulemaking*, MM Docket No. 95-31, FCC 02-44 (Feb. 25, 2002).

⁷⁴ *NPR*, 254 F.3d 226, 229, *supra*.

⁷⁵ *Id.*

⁷⁶ See *id.*

⁷⁷ See 47 U.S.C. § 309(j)(3).

⁷⁸ Under Section 309(j)(3) of the Communications Act, in developing a competitive bidding methodology and specifying the characteristics of licenses to be assigned by auction, the Commission is required to promote a number of objectives, including the development and rapid deployment of new technologies, products, and services for the benefit of the public, the promotion of economic opportunity and competition, the recovery of a portion of the value of the spectrum made available for commercial use, and the efficient and intensive use of the spectrum, in a manner that provides adequate time for interested parties to develop their business plans. 47 U.S.C. § 309(j)(3)(A)-(E). See *R&O and FNPRM*, 15 FCC Rcd at 22720 ¶ 23.

⁷⁹ Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, *Order on Reconsideration of the Second Report and Order*, PR Docket No. 93-61, 14 FCC Rcd 1339, 1345 ¶ 10 (1999) (*LMS Reconsideration Order*) (denying petition for reconsideration of Hennepin County, Minnesota seeking an exemption under Section 309(j)(2) from the Commission's auction of licenses in the Location (continued....)

order to prevent or respond to disasters or crises affecting their service to the public.⁵⁸ Furthermore, the Commission determined that where the majority of users licensed in an existing service and within a given frequency band are qualified to obtain auction exempt spectrum, future licensing for that service in that band will be exempt from auction.⁵⁹ Conversely, the Commission also determined that where a majority of users within a given frequency band are not qualified to obtain auction exempt spectrum, that band should not be designated as auction exempt for that service, even if some individual licensees in the frequency band use the spectrum to protect the safety of life, health or property.⁶⁰ In determining whether a user is qualified to obtain auction exempt spectrum, we examine the nature of the user, the type of service the user provides and the type of service offered in the subject frequency band.

21. We have before us twelve petitions seeking reconsideration and/or clarification of various aspects of the implementation of the public safety radio services exemption in the *R&O*.⁶¹ The petitioners request reconsideration and/or clarification of the following decisions: (1) applying the public safety radio services exemption to particular services rather than particular users; (2) examining the dominant use of a frequency band to determine whether the spectrum is exempt from auction; (3) defining "private internal radio service" as "a service in which the licensee does not make a profit, and all messages are transmitted between fixed operating positions located on premises controlled by the licensee and the associated fixed or mobile stations or other transmitting or receiving devices of the licensee, or between mobile stations or other transmitting or receiving devices"; and (4) requiring that the dominant use of spectrum that is not allocated for traditional public safety uses is by entities that "(a) have an infrastructure that they use primarily for the purpose of providing essential public services to the public at large; and (b) need, as part of their regular mission, reliable and available communications in order to prevent or respond to a disaster or crisis affecting the public at large" in order for the service to qualify for the exemption. Additionally, we will discuss several related issues on our own motion in an effort to clarify certain policies and rules.

1. Exemption of Spectrum Blocks

22. *Background.* In the *R&O*, the Commission agreed with the majority of commenters that the public safety radio services exemption applies to radio services, rather than specific users.⁶² Because of its conclusion that the rules for a particular service determine whether the service falls within the public safety radio services definition, the Commission indicated that the exemption applies only to spectrum that the Commission specifically designates for the particular uses that Congress intended to benefit.⁶³

23. *Discussion.* Petitioners believe that the exemption should apply to specific users, and all private radio spectrum users that fall squarely within the congressional exemption are auction-exempt,

⁵⁸ See *R&O and FNPRM*, 15 FCC Rcd at 22744-48 ¶¶ 75-78.

⁵⁹ See *id.* at 22744 ¶¶ 72-73. This "dominant use" test applies only when we are considering licensing additional applicants in an existing service in the same frequency band. It does not apply to new services, such as new service "overlays," in such a band. See para. 38, *infra*.

⁶⁰ *Id.*

⁶¹ See AAA Petition; CSAA Petition; Cinergy Petition; Commonwealth Edison Petition; Consolidated Edison Petition; Entergy Petition; KCPL Petition; Omaha Petition; Scana Petition; Union Electric *et al.* Petition; UTC Petition; Xcel Petition.

⁶² *R&O and FNPRM*, 15 FCC Rcd at 22741 ¶ 66.

⁶³ *Id.*

standing interpretation of the scope of its statutory obligation to consider means to avoid mutual exclusivity under Section 309(j)(6)(E).⁴⁴ The *R&O* observed that this interpretation was grounded in the Commission's statutory obligation to manage the spectrum in the public interest, noting:

Section 309(j)(3)(D) requires the Commission to promote efficient use of the spectrum, which is a valuable and finite public resource. To accomplish these objectives, the Commission must have the freedom to consider all available spectrum management tools and the discretion to evaluate which licensing mechanism is most appropriate for the services being offered.⁴⁵

As we noted in the *R&O*, our conclusion was also buttressed by a recent judicial interpretation of Section 309(j)(6)(E).⁴⁶ UTC has provided no new arguments or information to support a change in our conclusion that the amendment of Section 309(j)(1) to add a cross-reference to Section 309(j)(6)(E) serves to underscore the Commission's pre-existing obligation, but does not change its fundamental scope or content.⁴⁷

B. Band Manager Licensing

16. *Background.* In the *R&O*, the Commission concluded that, in addition to other licensing mechanisms, it should consider the use of band manager licensing as a future option for private services. The *R&O* also observed that the Commission had recently implemented the band manager concept for the first time in the 700 MHz Guard Bands, and found band manager licensing has the potential in other new spectrum allocations to provide private users with greater flexibility to access spectrum in amounts of bandwidth, periods of time, and geographic areas that best suit their needs.⁴⁸

17. *Discussion.* We do not agree with those petitioners that view band manager licensing primarily as a mechanism to subject private radio services to competitive bidding and a way to circumvent the statutory auction exemption for public safety radio services.⁴⁹ In substantively identical petitions, a number of utilities argue that "it appears that the Commission intends to auction the right to be a Band Manager in the Prime Utility Bands [the 470-512 MHz, 800 MHz, and 900 MHz bands]..."⁵⁰ In essence, these entities equate band manager licensing with the use of competitive bidding, which they oppose in the private services. The Commission rejected a similar argument in the *R&O* when many of these same petitioners equated the use of geographic area licensing with competitive bidding.⁵¹ The

⁴⁴ See *id.* at 22719-20 ¶ 21.

⁴⁵ See *id.* at 22721-22 ¶ 25 (citations omitted).

⁴⁶ See *id.* at n.46 and ¶ 25 (citing *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000), *petition for rehearing denied* (Oct. 25, 2000)).

⁴⁷ See *id.*, 15 FCC Rcd at 22719-20 ¶ 21.

⁴⁸ The Commission is also considering the possible use of band manager licensing in certain of the bands that are being transferred from the Federal Government to non-government uses. See Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Notice of Proposed Rule Making*, ET Docket No. 00-221, 15 FCC Rcd 22657 (2000).

⁴⁹ Cinergy Petition at 14-15; Consolidated Edison Petition at 14-15; Entergy Petition at 14-15; KCPL Petition at 15-16; Omaha Petition at 16; Scana Petition at 15-16; Union Electric *et al.* Petition at 15; Xcel Petition at 14-15; Consolidated Edison Petition at 15-16.

⁵⁰ Cinergy Petition at 15; Consolidated Edison Petition at 15; Entergy Petition at 15; KCPL Petition at 15-16; Omaha Petition at 16; Scana Petition at 16; Union Electric *et al.* Petition at 15; Xcel Petition at 14-15; Consolidated Edison Petition at 16.

⁵¹ See *R&O and FNPRM*, 15 FCC Rcd at 22725-26 ¶ 32.

comprises the dominant use of the spectrum.²⁵

10. The Commission also concluded that, subject to certain safeguards to prevent trafficking of PLMRS frequencies, 800 MHz Business and Industrial/Land Transportation ("I/LT") licensees should be allowed to modify their licenses to permit commercial use, or to assign or transfer their licenses to commercial operators for commercial use.²⁶ The Commission prohibited a licensee who modifies, transfers or assigns a license under this provision from obtaining new Business or I/LT spectrum in the same location for one year, and, with respect to licenses applied for after the adoption of the *R&O and FNPRM*, the Commission prohibited such modifications, assignments, or transfers until five years after the initial grant date of the license.²⁷

11. In addition, the *R&O* addressed issues relating to the awarding of licenses under Section 337 of the Communications Act, which allows entities seeking to provide public safety services (defined more narrowly than in Section 309(j)(2)(A)) to apply for "unassigned" spectrum not otherwise allocated for public safety use. The Commission concluded that where it has proposed rules for the licensing of particular spectrum by auction and released the public notice announcing the auction, requests for licensing under Section 337 will be scrutinized on a case-by-case basis to determine whether, as required by Section 337(c)(1)(E), a grant of a Section 337 application would be in the public interest.²⁸ The Commission also concluded that, pursuant to Section 337(c)(1)(A), Section 337 relief should only be available if the applicant demonstrates that there is no available public safety spectrum in any band in the geographic area where the public safety use is proposed.²⁹

12. Finally, several petitions for reconsideration were filed with respect to the determinations in the *R&O*. American Automobile Association (AAA) requests clarification or reconsideration of the Commission's ruling that Section 309(j)(2)(A) exempts only certain blocks of spectrum, rather than types of spectrum users, from spectrum auctions.³⁰ Similarly, several petitioners state that the Commission lacks the authority under Section 309(j) of the Communications Act to conclude that spectrum allocated for use by utilities is subject to competitive bidding.³¹ They also assert that the Communications Act prohibits the Commission from imposing auctions on auction exempt utilities indirectly via "band managers" licensed in the bands most commonly used by utilities. Central Station Alarm Association (CSAA) requests clarification of the Commission's definition of "private internal radio system" and of the term "public at large," contained in the standard used to determine whether a service is used to protect the safety of life, health or property.³² United Telecom Council (UTC) seeks reconsideration of the Commission's conclusion concerning the weight of its obligation to avoid mutual exclusivity, and seeks clarification with respect to future allocations for public safety radio services.³³ AllCom, LLC (AllCom)

²⁵ *Id.* at 22744 ¶¶ 72-73.

²⁶ *Id.* at 22760-64 ¶¶ 109-19; *see also* 47 C.F.R. §§ 90.179(i), 90.621(e)(2).

²⁷ *R&O and FNPRM*, 15 FCC Rcd at 22762-63 ¶¶ 114-15; *see also* 47 C.F.R. § 90.621(e)(2).

²⁸ *R&O and FNPRM*, 15 FCC Rcd. at 22769-70 ¶¶ 133-35.

²⁹ *Id.* at 22769 ¶ 132.

³⁰ AAA Petition for Reconsideration (filed Feb. 1, 2001).

³¹ Cinergy Corporation Petition (Cinergy Petition); Commonwealth Edison Company Petition (Commonwealth Edison Petition); Consolidated Edison Company of New York Petition (Consolidated Edison Petition); Entergy Corporation Petition (Entergy Petition); Kansas City Power & Light Company Petition (KCPL Petition); Omaha Public Power District Petition (Omaha Petition); Scana Corporation Petition (Scana Petition); Union Electric Company *et al.* Petition (Union Electric); Xcel Energy, Inc. Petition (Xcel Petition) (all filed Feb. 1, 2001).

³² CSAA Petition for Reconsideration (filed Feb. 1, 2001).

³³ UTC Petition for Reconsideration (filed Feb. 1, 2001).

and 337 of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997. This *Memorandum Opinion and Order* ("MO&O") addresses petitions for reconsideration and related pleadings regarding certain of our decisions in the *R&O*.

2. The major decisions in this *MO&O* are as follows:

- We affirm that the Balanced Budget Act amendments to Section 309(j) do not preclude the Commission from using licensing mechanisms for private services that permit the filing of mutually exclusive license applications if the Commission determines that it is in the public interest to do so.
- We reiterate that the public safety radio services exemption in Section 309(j) applies to services, rather than specific users. Moreover, we affirm the dominant use test set forth in the *R&O* as the means to determine whether the particular service qualifies for the public safety radio services exemption. We also retain and clarify the definition for "private internal radio service" set forth in the *R&O*.
- We retain the five-year holding period as a requirement for modification of a 800 MHz PLMRS authorization to permit commercial use.
- We affirm the decision in the *R&O* that an applicant must demonstrate that there is no public safety spectrum available to satisfy the public safety service use before it can be granted a waiver pursuant to Section 337.
- We reiterate whether a Section 337 application is in the public interest will be determined on a case-by-case examination of various factors, including the stage of the competitive bidding process with respect to the requested frequencies.

II. BACKGROUND

3. The Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act")² added Section 309(j) to the Communications Act, authorizing the Commission to award licenses for use of the electromagnetic spectrum through competitive bidding where mutually exclusive applications are filed. The 1993 Budget Act expressly authorized, but did not require, the Commission to use competitive bidding to choose among mutually exclusive applications for initial licenses or construction permits.³ As the Commission described in detail in the *Notice of Proposed Rule Making* in this proceeding (*Notice*),⁴ the Commission in

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Telecommunications Association, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, 15 FCC Rcd 22709 (1999) ("*R&O and FNPRM*").

² Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993).

³ 47 U.S.C. § 309(j)(1) (1996). As added by the 1993 Budget Act, Section 309(j)(1) stated,

(1) General Authority. -- If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

Paragraph (10) provided a number of conditions precedent and conditions subsequent to the Commission's use of competitive bidding, which are moot. See 47 U.S.C. § 309(j)(10) (1996).

⁴ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the (continued....)